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## **The Boy Scouts Amendment to P.L. 107-110, the No Child Left Behind Act of 2001: Legal Background**

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### **Summary**

On January 8, 2002, President Bush signed into law the No Child Left Behind Act of 2001, making major reforms to educational programs authorized by the Elementary and Secondary Education Act of 1965. A controversy that had shadowed the measure all year, and triggered divergent legislative responses from both houses, concerned the Boy Scouts of America (BSA), and the right of that organization to equal access with other community groups to use of federally funded public school facilities. In reaction to a recent U.S. Supreme Court decision, and BSA's highly publicized policy of excluding homosexuals from membership, several school districts across the nation sought to deny local scouting organizations free use of their facilities. By an agreement reached near the end of last session, conferees on H.R. 1 resolved differences between competing House and Senate amendments by adopting a basic prohibition against excluding the Boy Scouts from the use of public school facilities due to the organization's refusal to admit homosexuals, if other outside youth groups are permitted to use school property. School districts are not compelled to "sponsor" or otherwise support scouting organizations, however, as arguably might have been required by a broader reading of the House measure. The U.S. Department of Education is responsible for enforcing mandated equal access rights, through procedures authorized by Title VI of the 1964 Civil Rights Act, including termination of federal assistance to any "school" or "agency" that fails to comply.

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<sup>1</sup> P.L. 107-110.

<sup>2</sup> 20 U.S.C. §§ 6301 et seq.

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In *Dale v. Boy Scouts of America*,<sup>3</sup> the Court held that application of a New Jersey public accommodations law, forcing the Boy Scouts to extend membership to an avowed homosexual, violated the organization's First Amendment right to expressive association. In effect, the New Jersey law was found to burden the Boy Scouts' right to oppose homosexual conduct, an intrusion which could not be justified by the state's interest in curbing discrimination. The five to four majority applied a three-prong test to determine that the Boy Scout policy was protected by the First Amendment. First, examination of the Scout Oath, Law, and various position statements convinced the Court that the Scouts disapproved of homosexuality as a lifestyle choice, and forcing it to accept homosexuals as leaders would violate their "freedom of expressive association." Second, inclusion of homosexual leaders would signal acceptance by the group and significantly hamper its ability to advocate its public or private viewpoints. Finally, while the state had an interest in eliminating discrimination, it could not be exercised at the cost of another group's constitutional rights. In other words, the state could not compel the Boy Scouts to express a position totally at odds with its views.

Soon after the *Boy Scouts* ruling, disputes arose in Broward County, Florida, New York City, and several other jurisdictions concerning continued local school board support of scouting programs. In Broward County, school authorities reportedly "evicted 57 Boy Scout troops and Cub Scout packs from school property in December [2000]" for violating a nondiscrimination clause in their agreement for use of the facilities.<sup>4</sup> The Boy Scouts responded with a federal lawsuit in Miami district court challenging the officials' action as unlawful "viewpoint discrimination." The action claims that the school district violated the Scouts' right to free expression and equal access to public facilities. On March 30, 2001, in *Boy Scouts of America v. Till*,<sup>5</sup> the federal judge found a likelihood of success by the Boy Scouts on the merits of its claim and preliminarily enjoined Broward County officials from excluding them from school facilities during off-hours. By allowing a multitude of groups to use its facilities on a regular basis, the school district had created a "limited public forum" and could not, thereafter, exclude speech for reasons unrelated to the "purpose served by the forum," nor discriminate against a group on the basis of its viewpoint. The government, as a "speaker," could "fashion its own message," the court stated, and "need not assist the Boy Scouts in the solicitation of members through 'scouting days' and other affirmative acts." But despite its own "disapproval of intolerance towards homosexuality," the school board could not regulate the speech or "punish another group for its own message."

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<sup>3</sup> 530 U.S. 640 (2000).

<sup>4</sup> 2/18/01 Stat-Ledger (Newark N.J.), 2001 WL 12711932. The controversy centers on a policy the Scouts agreed to in 1998 that allowed them free use of school facilities. The policy states:  
The rental, use, or enjoyment of school facilities or services by any group or organization which discriminates on the basis of age, race, color, disability, gender, marital status, national origin, religion, or sexual orientation will not be permitted.

<sup>5</sup> 136 F. Supp.2d 132 (S.D.Fla. 2001).

Earlier actions by the House and Senate on amendments to the education reauthorization bill largely proposed to codify these judicial principles by making equal access to public school facilities by the Boy Scouts and similarly situated groups a condition to receipt of federal education funds. The Hilleary amendment was agreed to by voice vote in the House on May 23, 2001.<sup>6</sup> That measure prohibited the Department of Education (ED) from funding any public elementary or secondary school – or supervising state or local educational agencies – which 1) has a “designated open forum” and 2) “denies equal access or a fair opportunity to meet to, or discriminates against” the Boy Scouts or other youth groups with similar membership or leadership criteria regarding homosexuality or acceptance of the “groups’ oath of allegiance to God and country.” A “designated open forum” exists whenever a school permits “one or more youth or community groups to meet on school premises or in school facilities” outside of normal school hours. A “youth group” is any organization serving “young people under the age of 21.” The equal access requirements were to be enforced administratively by ED by rules and orders consistent with procedures set forth under Title VI of the 1964 Civil Rights Act,<sup>7</sup> with a right of judicial appeal to the federal circuit courts.

Generally, the Office of Civil Rights (OCR at ED) enforces Title VI by conducting investigations of complaints filed in its ten regional offices or at national headquarters in Washington, or by conducting compliance reviews. Compliance reviews are internally generated and are intended as broad investigations of overall compliance by federal aid recipients. Institutions are targeted for such review by examining information gathered in surveys by OCR and from other sources. The surveys are intended to assist the agency in identifying potential areas of “systemic discrimination.” Upon finding an apparent violation of Title VI or other applicable law, OCR notifies the fund recipient, i.e. the state or local education agency, and must then seek voluntary compliance.<sup>8</sup> If voluntary compliance cannot be secured, OCR may pursue enforcement through fund termination proceedings within the agency or seek compliance by other authorized means.<sup>9</sup> The administrative fund termination process entails notifying the alleged discriminatory entity of the opportunity for a hearing before an ED administrative law judge. Any final agency action terminating assistance to an educational institution may be appealed to the federal circuit courts.<sup>10</sup> Alternatively, and more often the case, the matter may be referred to the Department of Justice (DOJ) with recommendation for appropriate legal action.

An identical provision was added to the Senate version of the bill on June 14, 2001 when the Helms amendment was approved by a 51 to 49 vote.<sup>11</sup> Senator Helms described his amendment as follows:

Specifically, the pending amendment stipulates that if a public elementary school, or public secondary school, discriminates against the Boy Scouts of America – or any

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<sup>6</sup> 147 Cong. Rec. H2620 (daily ed. 5-23-2001).

<sup>7</sup> 42 U.S.C. 2000d-1.

<sup>8</sup> 34 C.F.R. § 100.7.

<sup>9</sup> Id. at § 100.8.

<sup>10</sup> 42 U.S.C. § 2000d-2.

<sup>11</sup> 147 Cong. Rec. S.6267 (daily ed. 6-14-2001).

other youth group similar to the Boy Scouts – in providing equal access to school facilities, then that school will be in jeopardy of losing its federal funds. . . .[I]t stipulates that the Office of Civil Rights within the Department of Education be given statutory authority to investigate any discriminatory action taken by school authorities against the Boy Scouts of America.

The Office of Civil Rights was established to handle discrimination problems that occur within the public school system. My amendment would direct the Office of Civil Rights to handle cases of discrimination against the Boy Scouts precisely the same as the Department of Education currently handles cases of discrimination – barred by Federal law and which may result in termination of Federal funds.<sup>12</sup>

But Senator Byrd was concerned that the language of the Helms amendment – protecting the Boy Scouts “or any other youth group . . . that prohibit[s] the acceptance of homosexuals” – was so broad that “it could include Ku Klux Klan youth groups or any other ‘hate’ groups.”<sup>13</sup> So he proposed a revision, approved by voice vote, to narrow its protections “to any youth group listed in title 36 of the U.S. Code as a patriotic society, including the Boy Scouts of America, based on that group’s favorable or unfavorable position concerning sexual orientation.”<sup>14</sup> The Senate then adopted a separate amendment, offered by Senator Boxer, guaranteeing equal access to meet in a designated open forum to “any youth group, including the Boy Scouts of America” regardless of their views on sexual orientation, but without any provision for terminating federal funds to school districts that fail to comply. That amendment was agreed to by a vote of 52 to 47.<sup>15</sup>

The education reauthorization bill thus arrived in conference with three versions of the Boy Scouts amendment. The Hilleary amendment was the broadest, both in terms of groups protected and the range of conduct prohibited. In addition to “equal access” and “fair opportunity to meet,” the House measure included a general prohibition on “discrimination,” which could reach beyond simple use of facilities to other distinctions between groups involving official sponsorship and other privileges. The Helms amendment retained most of the features of the House version, including the administrative enforcement procedure, but as modified by the Byrd amendment protected a potentially narrower universe consisting of “patriotic societies” – albeit more than one hundred in number and arguably among the most prominent national organizations. The Boxer amendment, by contrast, was confined in scope to equal access and fair opportunity to meet, but applied to “any youth group,” without restriction. But unlike the Hilleary and Helms version, no mechanism was provided for enforcement of the Boxer amendment, whether administratively or by a private right of action.

As emerged from conference, and signed by the President, § 9525 (the “Boy Scouts of America Equal Access Act”) blends aspects of these earlier contending approaches. Thus, the general “equal access” mandate requires that:

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<sup>12</sup> Id. at S6249-50.

<sup>13</sup> Id. at S6253.

<sup>14</sup> Id. at S6274.

<sup>15</sup> Id. at S6269.

Notwithstanding any other provision of law, no public elementary school, public secondary school, local educational agency, or State educational agency that has a designated open forum or a limited public forum and that receives funds made available through the Department [of Education] shall deny equal access or a fair opportunity to meet to, or discriminate against, any group officially affiliated with the Boy Scouts of America, or any other youth group listed in Title 36 of the United States Code (as a patriotic society) that wishes to conduct a meeting within that designated open forum or limited public forum, including denying such access or opportunity or discriminating for reasons based on membership or leadership criteria or oath of allegiance to God and country of the Boy Scouts of America or of the youth group listed in title 36 of the United States Code (as a patriotic society).<sup>16</sup>

In its formulation of forbidden practices, the statute is patterned on the original Hilleary/Helms amendment, which in addition to “equal access” and “fair opportunity to meet,” speaks more broadly in terms of protecting the Boy Scouts from “discriminat[ion]” based on their membership or leadership policies. Accordingly, beyond denial of access to facilities, federally-aided schools or educational agencies may be required to avoid actions or policies that adversely affect the ability of scouting organizations, as compared with other youth groups, to communicate with students or to otherwise operate within the schools. Whatever else may be intended, however, the new law makes clear that the nondiscrimination obligation does not compel schools or school districts to “sponsor” or promote scouting organizations, as might otherwise have been the case under earlier House and Senate proposals.<sup>17</sup> Procedures for administrative enforcement of equal access requirements, termination of federal funds to noncomplying schools and state or local educational agencies, and for judicial review of final ED actions are borrowed from Title VI of the 1964 Civil Rights Act, as described above.

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<sup>16</sup> P.L. 107-110, § 9525(b)(1).

<sup>17</sup> “Nothing in this section shall be construed to require any school, agency, or a school served by an agency to sponsor any group officially affiliated with the Boy Scouts of America, or any other youth group listed in title 36 of the United States Code (as a patriotic society).” *Id.*, § 9525(b)(2).

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